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(counsel continued on following page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

STACIA STINER et al.,

Plaintiffs,

v.

BROOKDALE SENIOR LIVING, INC. et al.,

Defendants.

Case No. 4:17-cv-03962-HSG (LB)

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: April 25, 2023
Time: 1:00 p.m.
Crtrm.: 2

Judge: Hon. Haywood S. Gilliam, Jr.

1 *(counsel continued from preceding page)*

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24 Proposed Classes
25
26
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1 The parties to the above-entitled action jointly submit this Joint Case Management
2 Conference Statement.

3 **1. Jurisdiction & Service**

4 This Court's jurisdiction is predicated upon the federal question presented by the
5 Plaintiffs' claims under the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et*
6 *seq.*, and diversity jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C.
7 § 1332(d)(2)(A). No issues exist regarding personal jurisdiction or venue. All named parties have
8 been served. Plaintiffs filed their Third Amended Complaint on February 15, 2019. ECF No. 90.
9 Defendants answered on March 8, 2019. ECF No. 110.

10 **2. Facts**

11 *Plaintiffs' portion*

12 Plaintiffs Stacia Stiner, Ralph Carlson, Lolesia Valette, Michele Lytle, Ralph Schmidt,
13 Patricia Lindstrom, Bernie Jestrabrek-Hart, and Jeanette Algarme are elderly people and/or people
14 with disabilities and their legal representatives and successors in interest who brought this lawsuit
15 to remedy significant violations of the ADA, Unruh Act, Consumer Legal Remedies Act, Unfair
16 Competition Law, and financial elder abuse law. The Court is familiar with Plaintiffs' factual
17 allegations. *See* Mar. 30, 2023 Order, 2023 WL 2722294 ("March 30 Order"); *see also* Third
18 Amended Complaint, ECF No. 90.

19 *Defendants' portion*

20 On July 13, 2017, Plaintiffs Patricia Eidler, Stacia Stiner, Mary-Catherine Jones, and Helen
21 Carlson filed a putative class action Complaint against Brookdale Senior Living Inc. and
22 Brookdale Senior Living Communities, Inc. ("Defendants"), alleging Defendants made contractual
23 misrepresentations about staffing and are responsible for allegedly understaffing the communities
24 at issue that purportedly utilized or utilize the "Brookdale Senior Living" brand (the
25 "Communities"), and had allegedly discriminatory policies regarding (a) physical barriers,
26 (b) transportation, (c) emergency evacuation, and (d) failing to modify staffing policies at
27 residents' requests in violation of the ADA and Unruh Act. (ECF No. 1.) On August 25, 2017,
28 Plaintiffs filed their First Amended Complaint and added Plaintiffs Bonita Hager and Lawrence

1 Quinlan. (ECF No. 20.) On March 29, 2018, Plaintiffs filed their Second Amended Complaint,
 2 adding Plaintiffs Edward Boris, Ralph Schmidt, Patricia Lindstrom, and Bernie Jestrabek-Hart.
 3 After Defendants sought to compel Plaintiffs Eidler, Hager, Jones, Carlson, and Quinlan to
 4 binding arbitration pursuant to the Federal Arbitration Act, on February 22, 2018, Plaintiffs Eidler,
 5 Hager, and Jones voluntarily dismissed their claims without prejudice. (ECF Nos. 39-41.) On
 6 February 15, 2019, Plaintiffs filed their Third Amended Complaint, which designated the same
 7 Plaintiffs as their Second Amended Complaint. (ECF No. 90.)

8 Plaintiffs' claims lack merit. The Communities ensure that their residents with disabilities
 9 have full and equal access to their services. The Communities likewise are staffed appropriately
 10 and sufficiently with experienced and caring employees throughout the day to assist residents with
 11 their needs. Further, Communities provide residents with accurate representations regarding of the
 12 levels of care and amenities they provide.

13 **3. Legal Issues**

14 *Plaintiffs' portion*

15 Plaintiffs allege that Defendants Brookdale Senior Living, Inc. and Brookdale Senior
 16 Living Communities, Inc. ("Defendants" or "Brookdale") have a corporate policy and practice of
 17 violating the ADA and the Unruh Act, by: (1) failing to remediate access barriers in their assisted
 18 living facilities as required by Title III of the ADA, (2) failing to comply with the ADA in their
 19 provision of transportation services, including through its corporate Fleet Safety Policy, which
 20 unlawfully requires electric wheelchair and scooter users to transfer to a seat on its vans and buses;
 21 (3) failing to ensure that residents with disabilities can be safely evacuated in an emergency; and
 22 (4) failing to make reasonable modifications in policy and practice to provide sufficient staffing to
 23 deliver the services identified in their assessments. Plaintiffs also allege that Defendants make
 24 false and misleading statements and omissions by failing to disclose that they systemically
 25 understaff their assisted living facilities. Defendants' standardized Residency Agreement
 26 promises to assess the resident's specific needs and provide services sufficient to meet those
 27 needs. But Defendants staff their facilities pursuant to mandatory corporate labor benchmarks that
 28 do not provide for enough staff to provide all of the services residents need. As a result, residents

1 are routinely denied essential services such as assistance with taking medication, housekeeping,
2 dressing, bathing, toileting, and hygiene. These material omissions violate California's CLRA,
3 UCL, and elder financial abuse statute.

4 *Defendants' portion*

5 Defendants dispute the claims Plaintiffs assert in the Third Amended Complaint. First,
6 with respect to Plaintiffs' claims under the ADA and the Unruh Act, the facts will show the
7 Communities are not "open to the public" like a hotel, store, or restaurant, but instead are long-
8 term residences where each individual lives in his or her own private apartment. Such private
9 housing is not a "public accommodation" under Title III of the ADA (or under the Unruh Act).
10 Even if the ADA did apply, the Communities consist of buildings that were all constructed or
11 altered at various times both before and since the enactment of the ADA, which will make
12 evaluation of any technical alleged barriers labor intensive and highly fact-specific. Plaintiffs
13 cannot show there was any policy or practice that denied residents with disabilities access to
14 transportation or emergency evacuation services. Finally, those Plaintiffs who are deceased or
15 otherwise no longer reside at the Communities lack standing to maintain their ADA claims.

16 Second, even if the housing provided in the Communities is subject to the ADA and Unruh
17 Act, Plaintiffs' understaffing allegations under the ADA fail because Plaintiffs cannot show
18 services are provided in a way that discriminates against disabled residents. Communities provide
19 reasonable modifications as necessary to ensure access to Community amenities and services by
20 residents with disabilities. Plaintiffs will not be able to show any Plaintiff requested reasonable
21 modifications to any policies, practices, and procedures regarding staffing to accommodate their
22 disabilities. Further, the evidence will show the staffing levels at the Communities were adequate.

23 Third, for Plaintiffs to prevail on their claims under the CLRA and UCL, Plaintiffs must
24 prove the alleged representations by Defendants were false or misleading and Plaintiffs actually
25 acted in reliance on the representations. The evidence will show neither is the case. In addition,
26 Defendants deny they engaged in any of the alleged fraudulent business practices. Further, with
27 respect to Plaintiffs' elder financial abuse claims, the evidence will show Communities provided
28 their residents with the contracted- and paid-for level of care, both in terms of basic and personal

1 services and availability of other services advertised to residents.

2 **4. Motions**

3 *Plaintiffs' portion*

4 On March 30, 2023, this Court granted certification of a subclass of Wheelchair and
5 Scooter Users pursuant to Fed. R. Civ. P. 23(b)(2) to challenge Defendants' Fleet Safety Policy
6 under the ADA. The March 30 Order denied class certification of Plaintiffs' other claims and
7 proposed classes. Plaintiffs respectfully disagree with the Court's March 30 Order, and have
8 sought permission to appeal it from the Ninth Circuit pursuant to Rule 23(f) through a petition
9 filed April 13, 2023.

10 Plaintiffs plan to file a Motion for Partial Summary Judgment regarding the Fleet Safety
11 Policy on behalf of the certified subclass and regarding certain disability discrimination and access
12 issues in the complaint on behalf of the named Plaintiffs, including the access barriers in the
13 named Plaintiffs' facilities. Plaintiffs will also seek leave to amend their complaint to add named
14 Plaintiffs who reside at Brookdale RCFEs, or in the alternative, such residents may move to
15 intervene in the action. Contrary to Defendants' assertion below, no scheduling order has yet
16 issued in this case. Plaintiffs anticipate filing a second motion for class certification, which will
17 seek to certify subclasses of residents at each facility at which a named plaintiff resides for all of
18 Plaintiffs' ADA and Unruh Act claims. In addition, if the forthcoming decision from the Ninth
19 Circuit in *Heredia v. Sunrise Living*, 9th Cir. Case No. 22-55332 is favorable to Plaintiffs, we may
20 bring a renewed class certification motion as to the consumer fraud claims. *See* Mar. 30, 2023
21 Order, 2023 WL 2722294, at *36 n.17.

22 *Defendants' portion*

23 Defendants will file their opposition to Plaintiffs' petition for permission to appeal the
24 Court's March 30 Order under Rule 23(f) by the deadline of April 24, 2023, per the Ninth
25 Circuit's Rules of Appellate Procedure.

26 Defendants intend to file a motion to stay the claims of the Wheelchair and Scooter Users
27 Subclass in anticipation of action regarding the alleged "Fleet Safety Policy" that will moot and/or
28 substantially impact the need for the injunctive relief sought by this subclass. Defendants also

1 anticipate filing a motion to decertify this subclass and/or a motion for partial summary judgment
 2 as to the claims of this subclass. Defendants also oppose any second and/or renewed motion for
 3 class certification, as Plaintiffs had ample opportunity to seek certification of any class or subclass
 4 in their Motion for Class Certification and failed to do so at the appropriate time. Plaintiffs should
 5 not be permitted to upend the existing scheduling orders regarding class certification to
 6 accommodate their own strategic decisions during the pendency of this litigation. (*See, e.g.*, ECF
 7 No 315.) Defendants also intend to oppose any motion to seek leave to amend Plaintiffs Third
 8 Amended Complaint, as well as any motions by other residents to intervene in the action. Finally,
 9 Defendants anticipate filing a motion for summary judgment on the individual claims.

10 **5. Amendment of Pleadings**

11 As noted above, Plaintiffs will seek leave to amend their Complaint to add named
 12 Plaintiffs. Contrary to Defendants' contention that Plaintiffs have waived their right to seek
 13 further amendments because of a statement in the July 2019 CMC statement, there is no Rule 16
 14 scheduling order in the case limiting the time for amendments. Moreover, Defendants misquote
 15 the 2019 CMC statement—Plaintiffs stated there that they would seek leave of the Court “[i]f
 16 Plaintiffs seek to file an amended Complaint (including to add a new named putative class
 17 representative),” and the parties stated that “[a]t present, neither party believes amended pleadings
 18 are necessary.” ECF No. 134 at 14 (emphasis added).

19 Defendants will oppose Plaintiffs' request for leave to amend their Third Amended
 20 Complaint. Plaintiffs already amended their Complaint three times over the course of this
 21 litigation, including to add new named Plaintiffs. Notably, in the joint case management statement
 22 the parties filed on July 9, 2019, after Plaintiffs filed their Third Amended Complaint, Plaintiffs
 23 stated that they did not “believe[] amended pleadings are necessary.” (ECF No. 134.) Plaintiffs'
 24 attempt to amend their Third Amended Complaint to add new named Plaintiffs now is a
 25 transparent step in furtherance of their strategy to certify subclasses of residents at as many
 26 Communities as possible after the Court denied Plaintiffs' motion for class certification as to
 27 almost all of Plaintiffs' claims and proposed classes. Plaintiffs should not be permitted to
 28 circumvent the Court's orders and the existing deadlines by essentially re-starting and re-litigating

1 the action with brand new Plaintiffs at this late stage. (*See, e.g.*, ECF No. 315.) Fed. R. Civ. P.
 2 15(a) (stating that while a party may amend its pleading once as a matter of course within 21 days
 3 after serving it, 21 days after service of a responsive pleading, or 21 days after service of a motion
 4 under Rule 12(b), (e), or (f), “[i]n all other cases, a party may amend its pleading only with the
 5 opposing party’s written consent or the court’s leave”).

6 **6. Evidence Preservation**

7 The parties have met and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable
 8 and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this
 9 action, and have discussed ESI Guidelines 2.01 and 2.02 as well as the Checklist for ESI Meet and
 10 Confer.

11 **7. Disclosures**

12 The parties’ Initial Disclosures were completed on March 5, 2019.

13 **8. Discovery**

14 *Plaintiffs’ portion*

15 Plaintiffs request that the Court direct immediate production of the full list of class
 16 members in the certified subclass. Plaintiffs seek such a list both for purposes of class notice and
 17 so that they can advise their clients regarding their claims (an attorney-client relationship with all
 18 members of the subclass having been created as of the date of this Court’s March 30, 2023 Order).
 19 The Court’s March 10, 2023 Order (ECF No. 589) stayed discovery pending the class certification
 20 ruling. Discovery is therefore now open again. Plaintiffs expect Defendants to answer their
 21 outstanding Requests for Production, Set Nine, and will continue to meet and confer regarding
 22 responses to these Requests. Plaintiffs anticipate serving additional written discovery requests and
 23 taking additional depositions. After the addition of new Plaintiffs, Plaintiffs will also seek to
 24 inspect any facilities not yet inspected by their experts at which such residents reside or resided for
 25 physical access barriers.

26 *Defendants’ portion*

27 Defendants anticipate serving limited additional discovery as necessary.

28 Defendants oppose Plaintiffs’ request for production of the list of members in the

1 Wheelchair and Scooter Users Subclass. The Court certified this subclass pursuant to Rule
 2 23(b)(2) only. As such, “notice to absent class members and an opportunity to opt out of the class
 3 are not required.” *Doe v. Wolf*, 424 F. Supp. 3d 1028, 1036 (S.D. Cal. 2020) (citing *Wal-Mart*
 4 *Stores, Inc. v. Dukes*, 564 U.S. 338, 361-62 (2011) (noting relief sought in a Rule 23(b)(2) class
 5 “perforce affect[s] the entire class at once” and, thus, the class is “mandatory” with no opportunity
 6 to opt out)). As such, Plaintiffs have not shown the production of such a list is relevant or
 7 warranted at this juncture. Further, Plaintiffs’ request is unduly burdensome and not proportional
 8 to the needs of this case because it would require Defendants to manually sort through hundreds of
 9 resident records to attempt to identify and make a determination as to whether each resident, at
 10 each and every Community still utilizing the Brookdale brand, uses a wheelchair, scooter, or other
 11 powered mobility aid, per the subclass definition. That burden is unwarranted under the
 12 circumstances, including in light of anticipated action regarding the alleged “Fleet Safety Policy”
 13 that will moot or substantially alter the injunctive relief claims of this subclass.

14 Defendants will serve responses to Plaintiffs’ Requests for Production, Set Nine, by
 15 May 2, 2023, per the agreement of the parties. As to the additional written discovery requests and
 16 depositions Plaintiffs anticipate, Plaintiffs already have sought and obtained enormous amounts of
 17 discovery throughout this litigation, including related to the merits. (ECF No. 569.) Accordingly,
 18 Plaintiffs’ need for any further discovery should be extremely limited and completed in short
 19 order.

20 As noted above in Sections 4 and 5, Defendants will oppose Plaintiffs’ request for leave to
 21 amend their Third Amended Complaint to add named Plaintiffs. Defendants will meet and confer
 22 with Plaintiffs as to any further Community inspections when Plaintiffs seek those inspections as
 23 necessary.

24 **9. Class Action**

25 *Plaintiffs’ portion*

26 Plaintiffs’ counsel have reviewed the Northern District’s Procedural Guidance for Class
 27 Action Settlements. As noted above, Plaintiffs seek immediate production of the full class list of
 28 the certified subclass of Wheelchair and Scooter Users. Plaintiffs request that the Court order that

1 notice be provided to all members of the certified subclass pursuant to Rule 23(c)(2)(A), including
 2 through mail, e-mail, and posting Plaintiffs' counsel's contact information in every Brookdale
 3 RCFE in California. Plaintiffs will also seek partial summary judgment on behalf of the certified
 4 subclass regarding the illegal Fleet Safety Policy. Plaintiffs also seek to file a second motion for
 5 class certification, which will seek to certify subclasses of residents at each facility at which a
 6 named plaintiff resides for all of Plaintiffs' ADA and Unruh Act claims, and may also seek to
 7 renew their motion for class certification of the consumer fraud claims following the Ninth
 8 Circuit's ruling in *Heredia*.

9 *Defendants' portion*

10 Defendants' counsel have reviewed the Northern District's Procedural Guidance for Class
 11 Action Settlements.

12 Defendants oppose Plaintiffs' request for production of the list of members in the
 13 Wheelchair and Scooter Users Subclass and for notice to be provided to all members of this
 14 subclass. As noted, the Court certified this subclass pursuant to Rule 23(b)(2) only. As such,
 15 "notice to absent class members and an opportunity to opt out of the class are not required." *Doe v.*
 16 *Wolf*, 424 F. Supp. 3d 1028, 1036 (S.D. Cal. 2020) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564
 17 U.S. 338, 361-62 (2011) (noting relief sought in a Rule 23(b)(2) class "perforce affect[s] the entire
 18 class at once" and, thus, the class is "mandatory" with no opportunity to opt out)). Moreover, for
 19 the reasons set forth above, Plaintiffs have not shown any need to provide notice to the absent
 20 members of this subclass at this juncture. The Court should deny their request.

21 As noted in Section 4 above, Defendants may file a motion to decertify this subclass and
 22 anticipate filing responses in opposition to Plaintiffs' motion for partial summary judgment and
 23 second and/or renewed motion for class certification.

24 **10. Related Cases**

25 This Court previously determined that this case was related to *Winans v. Emeritus*
 26 *Corporation*, Case No. 13-cv-03962-HSG. ECF No. 55. Plaintiffs are unaware of any other
 27 related cases.

1 **11. Relief**

2 Plaintiffs seek actual damages under Cal. Civ. Code § 1780(a)(1), Cal. Welf. & Inst. Code
3 § 15657.5(b), and Cal. Civ. Code § 3345. However, Plaintiffs do not seek damages related to any
4 personal injuries, emotional distress or wrongful death suffered by any member of the putative
5 classes.

6 Plaintiffs seek statutory damages in the amount of \$1,000 pursuant to Cal. Civ. Code
7 § 1780(a). As senior citizens and/or disabled persons, Plaintiffs and the class members are each
8 entitled to additional statutory damages of up to \$5,000 per person, pursuant to Cal. Civ. Code
9 § 1780(b).

10 Plaintiffs further seek trebling of the above-listed damages under Cal. Civ. Code § 3345.
11 Plaintiffs also seek punitive damages under Cal. Civ. Code § 3294, and restitution under Cal.
12 Bus. & Prof. Code §§ 17200 *et seq.* and Cal. Civ. Code § 1780(b)(3).

13 Plaintiffs additionally seek statutory damages pursuant to Cal. Civ. Code § 52(a) for the
14 putative class of residents with mobility and/or visual disabilities. Plaintiffs seek treble damages
15 pursuant to Cal. Civ. Code § 52(a).

16 Plaintiffs further seek injunctive relief requiring Defendants to bring their assisted living
17 facilities into compliance with the applicable requirements of the 2010 ADAS, the 1991 ADAAG
18 and the CBC.

19 Plaintiffs additionally seek injunctive relief under Cal. Welf. & Inst. Code § 15657.5(a),
20 Cal. Bus. & Prof. Code §§ 17200 *et seq.* and Cal. Civ. Code § 1780(a)(2) requiring that
21 Defendants immediately cease acts that constitute false advertising and violations of the Consumer
22 Legal Remedies Act and the Elder Financial Abuse statute with respect to Defendants'
23 misrepresentations, misleading statements, and material omissions, and to enjoin Defendants from
24 continuing to engage in any such acts or practices in the future.

25 Plaintiffs also seek injunctive relief requiring the Defendants disclose to Plaintiffs, the
26 putative class members and the consuming public that its corporate policies and procedures
27 preclude it from providing its residents with the care and services that they have been promised
28 and places all residents at an inherent and substantial risk that they will not receive the care and

1 services that have paid for on any given day, and prohibiting Defendants from charging fees based
 2 on the residents' Personal Service Plans when Defendants do not, in fact, provide adequate
 3 staffing levels to perform the personal services identified in those plans.

4 Finally, Plaintiffs seek an award of reasonable attorneys' fees, costs and litigation expenses
 5 under the ADA, California Government Code § 1021.5, and other statutes.

6 **12. Settlement and ADR**

7 The parties have previously held two unsuccessful mediations with Judge Edward A.
 8 Infante. Plaintiffs are amenable to a third private mediation before Judge Infante.

9 Defendants are willing to discuss with Plaintiffs the prospect of a third mediation with a
 10 mutually agreeable mediator should Plaintiffs propose to mediate in good faith.

11 **13. Consent to Magistrate Judge For All Purposes**

12 The parties do not consent to have a magistrate judge conduct all further proceedings.

13 **14. Other References**

14 The parties agree that this case is not suitable for reference to binding arbitration, a special
 15 master, or the Judicial Panel on Multidistrict Litigation.

16 **15. Narrowing of Issues**

17 The parties will meet and confer over whether bifurcating proceedings on liability and
 18 damages would be appropriate in this matter.

19 **16. Expedited Trial Procedure**

20 The parties agree that this case is not appropriate for an expedited trial procedure.

21 **17. Scheduling**

22 The parties request that the Court set a trial date.

23 Plaintiffs propose the following schedule.

24 Last day to seek leave to amend pleadings or file November 1, 2023
 25 motions for intervention

26 Last day to file second motion for class certification July 1, 2024
 26 (if leave to amend granted)

27 Fact discovery cut off August 30, 2024
 28

1	Designation of merits experts by the parties (non-	September 27, 2024
2	rebuttal)	
3	Designation of rebuttal expert by the parties	October 25, 2024
4	Expert discovery cut off	December 20, 2024
5	Last day to hear dispositive motions and <i>Daubert</i>	March 14, 2025
6	motions	
7	Pretrial Conference	June 6, 2025
8	Trial	July 14, 2025

9 Defendants propose the following schedule.

10	Fact discovery cut off	July 14, 2023
11	Designation of merits experts by the parties (non-	September 18, 2023
12	rebuttal)	
13	Designation of rebuttal expert by the parties	October 19, 2023
14	Expert discovery cut off	December 11, 2023
15	Last day to hear dispositive motions and <i>Daubert</i>	February 15, 2024
16	motions	
17	Pretrial Conference	April 8, 2024
18	Trial	April 22, 2024

19 **18. Trial**

20 *Plaintiffs' portion*

21 This case will be tried to a jury. Plaintiffs anticipate a three-week trial. Any equitable
22 remedies will be tried to the Court.

23 *Defendants' portion*

24 Defendants anticipate the length of trial will depend on the Plaintiffs and claims remaining
25 following summary judgment.

26 **19. Disclosure of Non-Party Interested Entities or Persons**

27 Both Plaintiffs and Defendants have filed a Certification of Interested Entities or Persons
28 as required by Civil Local Rule 3-15.

On Plaintiffs' side, other than the putative class representatives and class members, Plaintiffs are unaware of any other entities or persons with a financial interest in the proceeding or in a party to the proceeding or any other kind of interest that could be substantially affected by the outcome of the proceeding.

20. Professional Conduct

All attorneys of record for the parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

21. Other

The parties have no other matters to raise at this time.

The e-filing attorney hereby attests that (s)he has obtained concurrence in the filing of the document from the other signatories.

Respectfully submitted,

DATED: April 18, 2023

SCHNEIDER WALLACE COTTRELL KONECKY LLP

By: /s/ Guy B. Wallace

Guy B. Wallace

DATED: April 18, 2023

ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ Gay Crosthwait Grunfeld

Gay Crosthwait Grunfeld

Attorneys for Plaintiffs

DATED: April 18, 2023

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Erica Rutner

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